No. 88-1497

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LAWRENCE C. BIENEMAN,

Petitioner,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago, HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION FOR CITY RESPONDENTS

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QUESTIONS PRESENTED

1. Where a municipality allegedly destroys the value of real property and the owner sues for just compensation, does *Wilson v. Garcia*, 471 U.S. 261 (1985), uniformly compel application of the state's personal injury statute of limitations governing actions under 42 U.S.C. § 1983 when the owner sues directly under the Fourteenth Amendment?

2. Alternatively, if *Wilson* is not applied and a federal court borrows the most analogous state limitations period, which of three possible Illinois statutes of limitations applies to an alleged taking without compensation of a person's real property by making noise and vibration near the property: (1) the personal injury statute (two years), (2) the statute for damage to real property (five years), or (3) the statute for recovery of lands taken by adverse possession (twenty years)?

TABLE OF CONTENTS

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

REASONS FOR DENYING THE WRIT 3

I. Summary of Argument 3

II. Bieneman's Petition Ignores Settled Federal Law 4

A. Bieneman's Argument Is Foreclosed by the Recent Decisions of this Court 4

B. There Is No Conflict Among the Circuits 9

III. Bieneman's Invocation of the Twenty-Year Statute Is Erroneous 11

IV. Conclusion 18

TABLE OF AUTHORITIES

Page

CASES

Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805)..... 8

Bauske v. City of Des Plaines, 13 Ill. 2d 169, 148 N.E.2d 584 (1957)..... 9

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 10

California v. Ciraolo, 476 U.S. 207 (1986) 16

Chicago & Eastern Illinois Railroad Co. v. McAuley, 121 Ill. 160, 11 N.E. 67 (1887).....13, 17

Chin v. Bowen, 833 F.2d 21 (2nd Cir. 1987).....9, 10

Department of Transportation v. Rasmussen, 108 Ill. App. 3d 615, 439 N.E.2d 48 (2d Dist. 1982) 12

DiSanto v. City of Warrenville, 59 Ill. App. 3d 931, 376 N.E.2d 288 (2d Dist. 1978)..... 14

Don Roth Development Co., Inc. v. Missouri Highway and Transportation Commission, 668 S.W.2d 177 (Mo. Ct. App. 1984) 15

First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)..... 8

Florida v. Riley, 109 S. Ct. 693 (1989) 16

Goodman v. Lukens Steel Company, 482 U.S. 656 (1987) 4, 6

Griggs v. Allegheny County, 369 U.S. 84 (1962) 17

Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642 (1949), *cert. denied*, 338 U.S. 940 (1950).....12, 13

TABLE OF AUTHORITIES – Continued

Page

Kurtz v. County of Logan, 158 Ill. App. 3d 715, 511 N.E.2d 252 (4th Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) 14

Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391 (1979) 8

McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 8

McSurely v. Hutchinson, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107 (1988) 9, 10

Owens v. Okure, 109 S. Ct. 573 (1989).....4, 7

People ex rel. Markgraff v. Rosenfield, 383 Ill. 468, 50 N.E.2d 479 (1943)..... 14

Perona v. Illini Harbor Services, Inc., 130 Ill. App. 3d 984, 474 N.E.2d 1270 (3d Dist. 1985) 16

Prendergast v. Park Authority, 227 Va. 190, 313 S.E.2d 399 (1984) 14

Ranch 57 v. City of Yuma, 152 Ariz. 218, 731 P.2d 113 (Ariz. Ct. App. 1986)..... 14

State of Illinois ex rel Scott v. Butterfield, No. 74 C 2440 (N.D. Ill. 1974)..... 9

Suburban O'Hare Comm'n v. Dole, 787 F.2d 186 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986)..... 9

Tompkins v. Village of Tinley Park, 566 F. Supp. 70 (N.D. Ill. 1983) 15

United States v. Causby, 328 U.S. 256 (1946).....15, 16

United States v. General Motors Corp., 323 U.S. 373 (1945) 15

TABLE OF AUTHORITIES – Continued

Page

Wilson v. Garcia, 471 U.S. 261 (1985)..... *passim*

CONSTITUTIONS

United States Constitution, Amendment V....4, 5, 8, 15
United States Constitution, Amendment XIV .... *passim*
Illinois Constitution of 1870..... 13
Illinois Constitution of 1970, Art. I, § 15 .....12, 15

STATUTES AND REGULATIONS

Ill. Rev. Stat., ch. 110, § 13-101..... 12
Ill. Rev. Stat., ch. 110, § 13-205.....2, 12
14 C.F.R. § 91.79.....2, 16
42 U.S.C. § 1981.....6, 7
42 U.S.C. § 1983.....3, 5, 7, 8, 10
49 U.S.C. § 1301(29) 2, 16
49 U.S.C. § 1304.....2, 16
49 U.S.C. § 1508(a) 2, 16

OTHER

Aircraft Noise Problems: Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 87th Cong. (1962)..... 8

Helman and Whalen, *Constitutional Commentary*, Smith-Hurd, Illinois Constitution of 1970, Art. I, § 15 (1971)..... 13

Noise Pollution: Hearings on S. 1016, S. 3342 and H.R. 11021 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong. 2d Sess. (1972) 9

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BRIEF IN OPPOSITION FOR CITY RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the provisions cited by Petitioner Lawrence C. Bieneman ("Bieneman"), the following constitutional provisions and statutes are involved:

1. Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant

part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

2. The Illinois statute of limitations for, *inter alia*, injury to real property: "actions . . . to recover damages for an injury done to property, real or personal . . . shall be commenced within 5 years next after the cause of action accrued." Ill. Rev. Stat. ch. 110, § 13-205.

3. 49 U.S.C. § 1301(29): " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

4. 49 U.S.C. § 1304: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. . . ."

5. 49 U.S.C. § 1508(a): "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. . . ."

6. 14 C.F.R. § 91.79(a)-(c): "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

> (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

REASONS FOR DENYING THE WRIT

I. Summary of Argument

In this petition, Bieneman asks this Court to subvert the rule in *Wilson v. Garcia*, 471 U.S. 261 (1985), providing for a uniform limitations period for claims enforcing rights secured by the Fourteenth Amendment.[1] By arguing that direct constitutional actions should be controlled by different limitations periods than actions brought pursuant to 42 U.S.C. § 1983, Bieneman would reopen the fruitless search to borrow specific – and varying – limitations periods depending upon the characterization given the underlying constitutional claim asserted. This runs counter to this Court's recent reaffirmation that the federal courts should subject Fourteenth Amendment causes of action to a single statute of limitations in each State.

[1] Petitioner Bieneman has sought issuance of a writ of certiorari as to only one of the several issues resolved adversely to him by the court of appeals: the judgment that his claim for inverse condemnation (Count III) is barred by the applicable statute of limitations.

Bieneman has no support in the appellate courts for this approach. There is no conflict among the circuit courts of appeals here: three circuits have decided the issue directly, and all three are in agreement that the *Wilson* test applies to direct constitutional claims.

Even if Bieneman were to succeed in overturning *Wilson*, his claim – eight years old at the time of the complaint – would still be time-barred. The most closely analogous state statute of limitations to Bieneman's federal claim is Illinois' five-year limitations period for injury to real property.

II. Bieneman's Petition Ignores Settled Federal Law

A. Bieneman's Argument Is Foreclosed by the Recent Decisions of this Court

Bieneman argues that, in the case of actions brought directly under the Fourteenth Amendment to the United States Constitution,[2] the Court should investigate the particular cause of action and choose an analogous state statute of limitations. Bieneman is asking this Court to reconsider the holding and rationale of *Wilson v. Garcia*, 471 U.S. 261 (1985), as explained and reinforced in *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987), and again this year in *Owens v. Okure*, 109 S. Ct. 573 (1989).

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[2] Bieneman in his Petition declares in this Court that his action is brought "directly under the Fifth Amendment." Actually, to the extent that the case is brought directly under the Constitution, it would be under the Fourteenth Amendment, which applies to the States. *See* note 5, *infra*. Bieneman's Amended Complaint bears this out. (A-55 at ¶ 1; A-69 at ¶ 23).

In *Wilson*, the Court established a uniform method for borrowing statutes of limitations for actions brought pursuant to 42 U.S.C. § 1983, which creates a cause of action for violations of constitutional rights under color of state law.[3] In particular, the *Wilson* plaintiffs alleged violations of the Fourth, Fifth and Fourteenth Amendments. The Court recognized the wide variety of claims which could be brought under these constitutional provisions, and the resulting uncertainty in requiring a case by case search for an analogous state statute of limitations. 471 U.S. at 273-74. In light of the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," the Court held that one statute of limitations should apply to all § 1983 causes of action. *Id.* at 275. The Court found that to be the relevant state limitations period applicable to tort actions for personal injuries.

Bieneman's contention that *Wilson* has nothing to do with his Fourteenth Amendment case is disproved by the *Wilson* opinion itself. The Court emphasized that the statutory provision, § 1983, creates no substantive rights, but

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[3] Section 1983 reads as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ." 17 Stat. 13.

rather a remedy. *Id.* at 278. The substantive rights are created by the Fourteenth Amendment itself. The Court explicitly analyzed the language of the Fourteenth Amendment, and found it to be consistent with a uniform personal injury statute of limitations:

> The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every *"person"* subject to the jurisdiction of any of the several States. The Constitution's command is that all *"persons"* shall be accorded the full privileges of citizenship; no *person* shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

Id. at 277 (emphasis by the Court; footnote omitted). The clear holding of *Wilson* is that suits for violations of the Fourteenth Amendment are subject to the state personal injury limitations period.

Indeed, this Court has applied the *Wilson* holding to more situations than simply § 1983. In *Goodman v. Lukens Steel*, 482 U.S. 656, 107 S. Ct. 2617 (1987), the plaintiffs brought suit under 42 U.S.C. § 1981,[4] alleging racial discrimination against their right to make and enforce contracts. The Court held that § 1981, though it deals in part

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[4] Section 1981 reads as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

with contracts, specifically protects personal rights. 107 S. Ct. at 2621. The Court found that since § 1981 and § 1983 overlap to some degree, *Wilson*'s consistent limitations period would be "equally appropriate here." *Id.* Accordingly, the Court held that the state limitations period applying to personal injuries, not breaches of contract, was proper for § 1981. *Id.*

Most recently, the Court explained how to apply *Wilson* where the appropriate state has more than one statute of limitations for personal injury causes of action. In *Owens v. Okure*, 109 S. Ct. 573 (1989), the plaintiffs' alleged intentional beatings and misconduct by the police. The choice was between a statute of limitations applying to intentional torts, and one applying to general personal injuries not covered by specific statutes of limitations. The Court ruled that federal courts should not pick and choose among possible limitations periods based on the nature of the allegations; a single state limitations period – drawn from the state's personal injury tort statute of limitations – should control all § 1983 claims. 109 S. Ct. at 578-79.

In light of these three recent precedents, Bieneman may not validly argue that, while federal courts cannot choose a limitations period for violation of Fourteenth Amendment rights brought through § 1983 by examining the particular allegations to uncover an analogy, federal courts can and should regress to such a confusing analysis for alleged violations of the Fourteenth Amendment brought directly under the constitutional provision itself. Not only would such a rule require an abandonment of the *Wilson* rationale, but it would foster a new problem: actions for violations of the Fourteenth Amendment

would often have two different limitations periods, depending on whether the action was pled as a statutory § 1983 action or a direct constitutional action.[5] *Cf. McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958) (same statute of limitations should be applied to Jones Act claim and general maritime law claim in view of "practical necessity of combining both claims in a single action.")

Furthermore, application of the two year personal injury statute of limitations in this case would serve federal interests. As this Court stated in *Wilson*, "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws'." 471 U.S. at 271, *quoting Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805). Bieneman and numerous other suburban officials and residents have been fully aware of O'Hare's noise levels and aircraft operations for many years. *See Aircraft Noise Problems: Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 87th Cong. (1962);

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[5] Indeed, Bieneman's Amended Complaint is less than crystal clear on this point. In the jurisdictional section of the Amended Complaint (A-55 at ¶ 1), explicitly incorporated by reference into Count III of the Amended Complaint alleging an inverse condemnation, Bieneman cites both the Fourteenth Amendment *and* § 1983. (A-55, 68). Bieneman could bring his inverse condemnation claim through 42 U.S.C. § 1983, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399-400 (1979), or directly under the Fourteenth Amendment, through which the Fifth Amendment is applicable to the States. *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 2383, 2386 n.9 (1987). Apparently, Bieneman now claims to do the latter. (Bieneman's Petition at 3, n.2).

Noise Pollution: Hearings on S. 1016, S. 3342 and H.R. 11021 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong. 2d Sess. (1972); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 187-88 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986);[6] *State of Illinois ex rel Scott v. Butterfield*, No. 74 C 2440 (N.D. Ill. 1974);[7] *Bauske v. City of Des Plaines*, 13 Ill. 2d 169, 148 N.E.2d 584 (1957).

Indeed, Bieneman purchased his home in 1967 (A-55 at ¶ 4) when O'Hare was already the busiest airport in the world. Application of the twenty-year adverse possession statute advocated by Bieneman instead of the two-year personal injury statute would require the City to defend against stale claims.

B. There Is No Conflict Among the Circuits

Bieneman fails to mention in his petition that, with its decision below, the Seventh Circuit joins two other federal circuits which have held that direct constitutional actions are governed by the state personal injury statute of limitations. *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107 (1988). No court of appeals has held to the contrary.

In both *McSurely* and *Chin*, the plaintiff brought an action against a federal agent for violations of the

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[6] Bieneman was a named plaintiff in *Suburban*, which challenged an FAA decree approving an airport layout plan for O'Hare. 787 F.2d at 187 n.1.

[7] Bieneman, as Mayor of the City of Bensenville, Illinois, signed the consent decree in 1982 which ended the *Butterfield* case. (A-5 n.1).

plaintiff's constitutional rights, so-called *Bivens*[8] actions. The district courts in each case dismissed the complaints based on *Wilson*. In both cases the plaintiffs argued on appeal that *Wilson* was grounded in statutory construction and the legislative history of the Civil Rights Act, and that direct constitutional actions should have a different rule. *McSurely*, 823 F.2d at 1004; *Chin*, 833 F.2d at 23. This is Bieneman's argument. (Bieneman's Petition at 15-16). Yet, both the Sixth and Second Circuits rejected this contention. The *McSurely* court reasoned that it was important to have uniformity between direct causes of action and § 1983 cases, especially since many cases involve both. 823 F.2d at 1005. The *Chin* court agreed, noting that *Bivens* actions and § 1983 actions are both designed to provide redress for constitutional violations. 833 F.2d at 24.

The Seventh Circuit's decision is in complete accord with these decisions. The Seventh Circuit held:

> When the defendant is a state actor, § 1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy.

Bieneman, 864 F.2d 463, 469 (also reprinted at A-15).

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[8] *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The writ is unnecessary here to resolve any split among the circuits. The three courts of appeals which have faced this issue have properly followed this Court's decision in *Wilson* and unanimously rejected Bieneman's argument.

III. Bieneman's Invocation of the Twenty-Year Statute Is Erroneous

Bieneman's attempt to have this Court revisit *Wilson* is not only misguided; it would also be futile. Even if Bieneman prevailed on his argument to ignore *Wilson* and search for a state limitations period analogous to his particular case, a federal court would have to choose among three possible statutes of limitations: personal injury (2 years),[9] taking of property (20 years) and damage to property (5 years). Because Illinois' five year limitations period for damage to property is more closely analogous than the adverse possession statute, Bieneman's action would in any case be barred.[10]

To select the most analogous state statute of limitations, a federal court must first characterize the nature of Bieneman's action. Here, Bieneman has conspicuously not alleged that the City literally invaded and occupied his property in order to physically take it. Rather, he

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[9] Independent of its holding in *Wilson* that federal courts should be consistent in borrowing limitations periods, the Court found that the Fourteenth Amendment protects *personal* rights. 471 U.S. at 277. *See* discussion of *Wilson* at 6 *supra*.

[10] In light of its decision that *Wilson* applies here, the court of appeals below briefly discussed, but did not resolve, this argument. *See* A-13.

claims that the City damaged his property by alleging that the City "totally destroyed the value of Plaintiffs' property as residences" by aircraft operations. (Amended Complaint, Count III, ¶ 22; A-69). Bieneman's express allegations are best characterized as "an injury done to property, real or personal" (Ill. Rev. Stat., ch. 110, § 13-205) and not "an action for the recovery of lands." (Ill. Rev. Stat., ch. 110, § 13-101).

The Illinois Constitution of 1970 in Article I, Section 15 expressly provides two mutually exclusive categories of inverse condemnation – a taking of property and a damaging of property. A "taking" under Illinois law is limited to the case where an actual, physical invasion of real property by the government occurs. *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949), *cert. denied*, 338 U.S. 940 (1950); *Department of Transportation v. Rasmussen*, 108 Ill. App. 3d 615, 439 N.E.2d 48 (2d Dist. 1982). Merely conducting an activity adjacent to a landowner's property which damages the value of the property is not a "taking" under the Illinois Constitution, but rather is a "damaging."

Two Illinois Supreme Court cases illustrate the impact of this dichotomy on the applicable limitations period. In *Horn v. City of Chicago, supra*, property owners sued the City of Chicago for construction of a viaduct which allegedly interfered with and destroyed the property owners' access to light, air, ingress and egress to buildings adjoining the viaduct. The Supreme Court of Illinois first noted that no claim for a taking could be made in the absence of an actual physical invasion and occupation of the land. However, a constitutional claim

for a damaging could arise from the destruction or disturbance of easements of light, air, accessibility or other intangible rights. 403 Ill. at 554-55.[11]

Next, the supreme court turned to the question of the applicable statute of limitations to a damaging of property without just compensation. The court rejected the 20-year adverse possession statute asserted here by Bieneman as the controlling statute, and concluded that the five-year statute of limitations relating to actions to recover damages for injury done to real property was controlling. 403 Ill. at 561.

In *Chicago & Eastern Illinois Railroad Co. v. McAuley*, 121 Ill. 160, 11 N.E. 67 (1887), the Supreme Court of Illinois reached a similar result. The plaintiff contended that the nearby operation of a transportation facility – a railroad – through vibration, dust, smoke, cinders and other substances cast upon plaintiff's dwelling and premises, materially damaged his property and depreciated its value. The court concluded that the five-year statute of limitations governing actions to recover damages for injury done to property controlled. 121 Ill. at 168-69. It found that the statute was not affected by the continuing nature of the railroad's operations. 121 Ill. at 165-66. Because the railroad line was constructed more than five years prior to the commencement of the action, it found the entire claim barred by the statute of limitations. *See*

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[11] The current Illinois Constitution of 1970 reenacted the applicable provisions of the 1870 Constitution, in effect at the time of *Horn*, relating to constitutional takings and damagings. *See* Heiman and Whalen, *Constitutional Commentary*, Smith-Hurd Art. I, § 15, at 600-01 (1971).

also Kurtz v. County of Logan, 158 Ill. App. 3d 715, 511 N.E.2d 252, 254 (4th Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) (five-year statute of limitations governing damage to real property applies to claim against county for flood damage arising from county's construction of a bridge and highway adjacent to plaintiff's property.)[12]

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[12] The Illinois' cases cited by Bieneman (Petition at 11) do not dictate a contrary result. Both *DiSanto v. City of Warrenville*, 59 Ill. App. 3d 931, 376 N.E.2d 288 (2d Dist. 1978), and *People ex rel. Markgraff v. Rosenfield*, 383 Ill. 468, 50 N.E.2d 479 (1943), involved allegations of physical invasion coupled with actual occupation and adverse use of property. The numerous cases cited by Bieneman from other jurisdictions do not advance his statute of limitations argument, either. First, the cases simply interpret the different limitations periods applicable in a wide variety of jurisdictions to various types of inverse condemnation actions. They do not constitute a statement of that "local time limitation" which this Court has contemplated would be borrowed when Congress has not established a time limitation for a federal cause of action. Illinois' particular limitations law distinguishing between constitutional "takings" and "damagings" of real property constitutes the applicable local limitations law.

Indeed, no monolithic rule of law mandates that the appropriate statute of limitations for inverse condemnation claims is always the statutory limitations period for actions to recover land under claims of adverse possession. Several state cases (not cited in Bieneman's Petition) have expressly rejected an adverse possession limitations statute for inverse condemnation claims. *See, e.g., Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (Ariz. Ct. App. 1986) (rejecting adverse possession statute and applying four-year "catch all" limitations statute to inverse condemnation claim); *Prendergast v. Park Authority*, 227 Va. 190, 313 S.E.2d 399 (1984) (applying three-year implied contract statute of limitations to inverse condemnation claim);

(Continued on following page)

The United States Constitution, under which Bieneman has brought this action, does not distinguish between what the Illinois Constitution characterizes separately as "damagings" of property for a public purpose and "takings" for a public purpose. Rather, what would be *both* "damagings" and "takings," as defined under the Illinois Constitution of 1970 (Art. I, § 15), are actionable against a municipality under the Fourteenth Amendment, incorporating the Fifth Amendment requirement of just compensation for "takings." *See United States v. Causby*, 328 U.S. 256, 260-61 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Tompkins v. Village of Tinley Park*, 566 F. Supp. 70, 75-76 n.5 (N.D. Ill. 1983) (comparing Illinois and federal rules). Here, Bieneman's alleged "taking" under the Fifth Amendment is actually most analogous to an Illinois "damaging" case for the purposes of choosing a limitations period.

Bieneman insists that his allegation of airflights "over" his property makes his claim more analogous to an actual taking supported by the required physical invasion, than a damaging through adjacent operations. (*See* Bieneman's Petition at 13 n.5). The problem with Bieneman's contention is that in the context of aircraft operations, a "taking" for the purposes of Illinois' statute of

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Don Roth Development Co., Inc. v. Missouri Highway and Transportation Commission, 668 S.W.2d 177 (Mo. Ct. App. 1984) (applying five-year limitations period, not adverse possession statute to inverse condemnation claim.)

limitations can only occur where aircraft pass directly through airspace legally owned by a landowner. Bieneman has not and cannot in good faith allege operation of aircraft through airspace legally owned by him.

The United States has "complete and exclusive national sovereignty in the airspace." 49 U.S.C. § 1508(a). There exists a "public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. "Navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this Chapter, which shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301(29). The navigable airspace extends upwards in congested areas from 1,000 feet above the highest obstacle in the area and from 500 feet above the surface otherwise. 14 C.F.R. § 91.79 (1988). In light of these statutory provisions, it has long been recognized that a landowner's legal property interests only extend upward to the bottom of the federally created navigable airspace. Above that level is "public highway." *United States v. Causby*, 328 U.S. 256, 261 (1946); *cf. Florida v. Riley*, 109 S. Ct. 693, 696-97 (1989) (plurality opinion); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (acknowledging that helicopters and fixed-wing aircraft, respectively, were operating in the navigable airspace and therefore a defendant had no expectation of privacy for observations of his property made from the aircraft); *Perona v. Illini Harbor Services, Inc.*, 130 Ill. App. 3d 984, 986, 474 N.E.2d 1270 (3d Dist. 1985) (barge traffic on a navigable river is not trespass of plaintiff's riverbed property).

Operations of aircraft within the navigable airspace occur within the public domain and do not invade Bieneman's legally-owned property. So, while Bieneman may have a federal "taking" claim based on these allegations, *see Griggs v. Allegheny County*, 369 U.S. 84 (1962), Bieneman's claim is analogous to the landowner's claim in *Chicago & Eastern Illinois R.R.*, a "damaging" case as opposed to a taking case, for the purposes of the Illinois statute of limitations. As such, even if this Court were to abandon the uniform rule dictated by *Wilson*, the most analogous state limitation period would be the five year period applicable to damage to property. Under this statute, Bieneman's claim in Count III of the Amended Complaint is time barred. (A-68 at ¶ 22).

IV. CONCLUSION

For these reasons, Bieneman's petition should be denied.

Respectfully submitted,

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